SUPREME COURT, U. S.

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No. 357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH W. DICK ET AL., *Petitioners*

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL., *Respondents*

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS REPLY TO RESPONDENTS BRIEF

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Petitioner files this Reply in order to underscore the imperative need to correct the errors and ambiguities contained in the decision of the Court of Appeals so clearly revealed by the confusion apparent in Respondents understanding of the basis of that decision. In addition it is necessary to correct the constantly repetitive misstatements as to the rules and regulations in effect as of November 1959, the date petitioners rights were violated.

1. Respondents are silent as to the Circuit Courts' pronouncement that the "transfer of function" provision in the Veterans Preference Act of 1944 is now to be interpreted on the basis of concepts applicable to the Reorganization Act of 1939

Respondents acknowledge, by quoting from a definitive portion of the decision, that the court's approval of the Commission's action is specifically predicated upon the court's "interpretation and understanding of the term 'function' under the Reorganization Act of 1949." (Resp. Bf., p. 6). There they drop the issue. Respondents' silence therefore constitutes a mute appeal to this Court to grant the Petition so as to give guidance to the Commission which certainly must find the decision not only baffling but contrary to the application of the "transfer" proviso which it has followed since 1954 on an *intra-agency* basis (R. 138). The silence of the Respondents is also due, no doubt, to their knowledge that the history of the Veterans Preference Act does disclose an intent to cover intra-agency transfers. They must know, for example, that Millard Rice, National Representative of the Veterans of Foreign Wars, is the author of the transfer of functions proviso and that he testified[1] as to the scope of the problem to be corrected by that language as follows:

> "I have been very much interested in a practice that is quite a favorite in various agencies of the Federal Government, particularly the Public Works Administration that resort to the general process of abolishing a particular section. It has been their practice to put the veterans that they do not want in a certain section and then decide that that particular section is no longer needed, perhaps by transferring the functions of that particular section over to some other section, thus avoiding compliance with the law to give preference in retaining veterans."

2. Ignoring the novel conclusion of the Court of Appeals (that only *inter-agency* transfers authorized by Congress are protected by the statute), the Respondents now inject a new argument not accepted by the Court of Appeals. Respondents state repeatedly that there existed a "regulatory scheme" "recognized" by the "court below" (Resp. 13)

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[1] Hearing before Committee on Civil Service, House of Representatives, 76th Congress, in connection with HR 5101, where the proviso originally appeared

which excluded from the statutory protection transfers of function *within* a "competitive area."

Petitioner informs this court, and by record reference will show, that not only was the "competitive area" concept not in existence when the contested agency action took place but that it was never recognized by either the Civil Service Commission, the District Court or the Court of Appeals as bearing on the issues in this case.

On the contrary, the "regulatory scheme" in effect as of November 1959 made the statutory proviso expressly applicable to *intra agency* transfers and the Navy implemented this by specifically declaring that the transfer rights apply to transfers from one location to another within a shipyard.

It is the agencies' departure from the "regulatory scheme" that constitutes the basis for petitioner's claim for relief. Respondents, quite correctly, recognize that the denial of employees' rights provided by applicable rules and regulations constitutes a matter "worthy of this Court's consideration." *Service* v. *Dulles*, 354 U.S. 363 (Resp. Bf. 14, 15). However, after acknowledging the principle, Respondents then set out, by repeated statements, to lead the Court to believe that as of November 1959 there existed a rule making the "transfer of function" proviso inapplicable to transfers within a "competitive area" i.e. within a shipyard. (Resp. Bf., 9, 1st par. P. 10 and (c) on p. 12) These statements do not accord with the facts.

The fact is that in November 1959 the regulations of the Navy specifically provided that upon transfer of functions the "employees shall be transferred with the functions" and

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The issues in this case were limited by the parties through stipulation May 20, 1960 (R. 19) to the application of these existing regulations of the Commission and the "Department of the Navy."

The Civil Service Commission implemented *Service* v. *Dulles*, 354 U.S. 363, and *Watson* v. *U.S.* 355 U.S. 23 by issuing an instruction Dept. Circ. No. 1019, Sept. 18, 1959 (R. 192, 193) making departures from agency procedural regulations appealable to the Commission.

gave the same procedural protection to employees whether transferred from one shipyard to another or to a different "location within the same activity," NCPI 170, 9-4 (a), (b), (c) (Pet. 35, 36). A shipyard is defined as an "activity" NCPI 170, 4-1 a (2) (b) (Pet. 35).[1] The Respondents by remaining silent as to the provisions of 4 (b) and (c) supra, and by taking a few words out of context in subordinate paragraph 4 (b) (1) flatly represent that only transfers between shipyards are subject to the transfer of function requirements (Resp. Bf., p 10, 1st par.).

The fact is that the Civil Service Commission (as well as the Navy), since 1954, recognized the application of the "transfer" proviso to "intra-agency" transfers without limitation (Dept. Circ. 740 R. 138). This was the law in November 1959 and in order to leave no doubt as to the manner in which the Commission believed it should be applied the Commission set forth in the 1954 circular an example which fits this case exactly, and is reproduced in the Appendix C of the Petition (Pet. 41).

The further truth is that in June 1960, after the appeals herein were filed and after the Navy and the employees had stipulated to submit a pilot case for determination (R. 19), the Commission changed the rules and limited the statutory protection to transfers *between* "competitive areas". (R. 145). However, the Commission recognized the existence of pending litigation and made the new position applicable to prospective actions beginning with August 22, 1960 (R. 145, 152).

The fact is the Navy *after* the Civil Service change of June 1960 also changed its rules. It did this June 30, 1960 and specifically provided that the new rules would apply to

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[1] Significantly, this definition is included in the section dealing with "*competitive areas*" (R. 180) so that Navy Regulations were written with the clear provision that transfer of function procedures were to be followed *within* a *competitive area* and a competitive area could be larger than a naval activity (R. 179).

The stipulation provided among other things that the employees did not waive their rights to seek review in court. (R. 20).

situations arising *"on or after"* August 22, 1960. OIR Notice (R. 194, 195). The changes announced by the Navy consisted of scrapping (R. 195) the provisions in NCPI 170. 9-4 (b) and (c)[2] which gave protection to transfers from one location to another location within a shipyard. It did this, it is stated specifically, to put into effect the Commission's new concept of "area of competition". This, it goes on to say, "eliminates the problems which have previously arisen in connection with intra-activity reorganizations." (R. 194)

In light of these facts, all of record, the repeated assertions by Respondents throughout their brief that this case is governed by the "competitive area" concept cannot help but mislead the Court. As it relates to transfer of function, the words "competitive area" had never been employed. The Civil Service Commission refused to rely on this basis in upholding the Navy's action, and the concept was ignored by both the District Court and the Court of Appeals.

3. Respondents are again in error in stating that Service v. Dulles is not applicable because procedural rights were not violated (Resp. Br. 14-15). The third proviso of Sec. 12 establishes a procedural right. This right is implemented in clear language by the Commission in Dept. Circular No. 740 (Pet. 40, 41) which states that "incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions *prior* to any reduction-in-force action." As alleged in the complaint and reflected in the granting of the employees' motion for Summary Judgment, the agency processed a reduction-in-force without first transferring the employees with the transferred function. The procedure was thus unlawful from the beginning, which is the very essence of Petitioners' grievance.

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[2] NCPI (Navy Civilian Personnel Instructions) "Transfer of Function" Chapt. 170. 9-4 (Pet. 35)

The NCPI regulations covering transfer of function carry the printing date 1958

Contrary to the view of Respondents, it is this practice of ignoring employees' rights, with resultant demoralization of employees and burdensome litigation, that has recurring significance. It is a practice which should now be discouraged and only consideration by this Court can accomplish that necessary result.

4. Finally, Petitioners are prepared to show to the Court, if Petition is granted again contrary to the declarations of Respondents, that grave harm has been done to the Petitioners. Each of them was reached by reduction in force resulting in an immediate curtailment of 8% of their wages. It is of no weight to suggest that many of them were able subsequently to transfer to other jobs or were retained in lesser positions. Wherever they are, their standing has been affected.

Petitioners are also prepared to show that *Cutting v. Higley* 235 F. 2d 515 did not involve transfer of function, and has no bearing on this case. Furthermore, no promotions are involved here. Employees of both groups were being paid according to the base grade of their skilled craft plus a differential which, because of separate formulae (R. 189), resulted in some Analysts and Schedulers being paid more than Planners and Estimators. However, of more significance is the language of the third proviso which places no limitation on transfers pitched on variations in wage formulae. *Feldman v. Hester*, 276 F 2d 485.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

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